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IN THE MISSOURI SUPREME COURT

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**SC88647**

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CITY OF ARNOLD  
Plaintiff-Appellant  
v.  
HOMER R. TOURKAKIS, et al.  
Defendants-Respondents

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ON APPEAL FROM THE CIRCUIT COURT OF JEFFERSON COUNTY  
Honorable M. Edward Williams, Judge

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BRIEF OF AMICUS CURIAE

RONALD J. CALZONE

Ronald J. Calzone  
33867 Highway E  
Dixon, MO 65457  
(573) 759-7556  
ron.c@ewranch.com

*Amicus Curiae* filing Pro Se



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## STATEMENT OF INTEREST

*Amicus Curiae* Ronald J. Calzone files this brief Pro Se pursuant to Supreme Court Rule 84.05(f), 84.06(c) and 84.06(f)(3). *Amicus Curiae* is a citizen of the State of Missouri and property owner within that state but in an area outside of any chartered city or county. As such, he has a vested interest in the instant case – an interest not merely in the outcome, but also in any legal precedent that might result from the outcome. *Amicus* believes that this case has the potential to affect not only the use of his property but also the way Missouri government executes its responsibility to provide security for his other natural liberties and those of his progeny.

*Amicus* files this brief to address the limits on eminent domain that are implicit and express in the Missouri Constitution. Those limits prohibit the attempt by the City of Arnold, Missouri to utilize the power of eminent domain to take the private property of two individuals, Respondents Homer and Julie Tourkakis, for a private use – a shopping mall to be owned and operated by THF Realty. Those limits also prohibit similar unlawful takings of property in the political subdivision in which *amicus* owns property – like the City of Arnold, this is a non-charter portion of the state.

*Amicus* believes that Missouri was founded upon strong principles of personal and individual liberty and that the primary role of Missouri's government is to protect that liberty. While it is true that the state is constitutionally charged with a number of other responsibilities that seem to be on a societal level, it would be profaning the very stated purpose of government if pursuit of those societal responsibilities diminishes basic liberties, like the right to the use and enjoyment of the fruit of one's labor.

What's more, *amicus* is concerned that current practices surrounding the use of eminent domain invite political corruption of the sort that lead to even greater societal problems than those such practice seeks to remedy. Economic freedom is the foundation of our prosperity and to allow powerful, well-connected individuals to co-opt one of the most awesome powers of government in a way that gives them an unfair edge over competition is antithetical to everything America stands for. This *Amicus Curiae* believes that the words of James Madison, the Drafter of the U.S. Constitution, are germane, here:

“In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights....

Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own....

That is not a just government, nor is property secure under it, where the property which a man has in his personal safety and personal liberty, is violated by arbitrary seizures of one class of citizens for the service of the rest. A magistrate issuing his warrants to a press gang, would be in his proper functions in Turkey or Indostan, under appellations proverbial of the most compleat despotism.” Hunt, Gaillard, *The Writings of James Madison*, (New York: G.P. Putnam’s Sons, 1906),

Vol. VI, p. 102, “Property,” March 29, 1792.

*Amicus* believes that the City of Arnold, and many other non-chartered Missouri cities, have acted in direct violation of their constitutional responsibilities. Article I, § § 2 & 28 of the Missouri Constitution charges them with preventing private property from being “taken for private use” “unless by consent of the owner”, but not only are many of those cities negligent in their responsibility to prevent such takings, they persist in facilitating and promoting them.

The outcome of this case **reaches beyond the litigants** to every Missouri citizen who is concerned about restoring traditional property rights and maintaining healthy principles of governance.

## INRODUCTION AND BACKGROUND

### I

#### 1) **The only true Inherent Powers exist in the people of the state, as individuals.**

While it might be true that eminent domain powers are implicit in the social compact formed by the people, any application of those powers which is destructive of the rights of the people is a misapplication.

It is an immutable fact that the State of Missouri was born of the mutual consent of the *individuals* living in the territory at the time. The resulting constitution was in recognition of inalienable liberties due all people and also the powers inherent in any social compact formed to preserve those inalienable liberties. That first constitution, and the present constitution, are clear that all political power is derived from and is for the benefit of the *individuals* of the state. This is exemplified by terms like “we the people”, “mutually agree”, and “all persons”.

“We, the people of Missouri, inhabiting the limits hereinafter designated, by our representatives in convention assembled, at St. Louis, on Monday, the 12th day of June, 1820, do mutually agree to form and establish a free and independent republic, by the name of "The State of Missouri," and for the government thereof do ordain and establish this constitution.” Missouri Constitution of 1820, Preamble

Missourians did not plow new ground when they formed their social compact –

they were merely following the great American example. The basic premise of government itself is that rights, including property rights, are inherent in the individual and the primary role of government is the protection of those inherent rights. That was the claim of the U.S. Declaration of Independence:

“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed” U.S. Declaration of Independence (emph. added)

James Madison wrote: “Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own....” Madison's concept of “property of every sort” included “land, merchandise, money, opinions, religion, safety and liberty, or the free use of one's faculties”.<sup>1</sup> Hunt, Gaillard, *The Writings of James*

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1 Madison and the other Founders built on the principles espoused by John Locke, who wrote, "The reason why men enter into society, is the preservation of their property; and the end why they chuse and authorize a legislative, is, that there may be laws made, and rules set, as guards and fences to the properties of all the members of the society".

Locke, John, *Two Treatise of Government, Book 2* Chapter XIX Section 222

*Madison*, (New York: G.P. Putnam's Sons, 1906), Vol. VI, p. 102, "Property," March 29, 1792.

Missouri's constitution, in 1820 and today, is a direct reflection of these principles.

**2) The two most defining statements of that organic law, Missouri's current Article I, § 1 & 2, leave no room for speculation about this and must be the foundation upon which a decision about the instant case is built.**

The only true "inherent" political power resides in the people.

"That all political power is vested in and derived from the people; that all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole."

Missouri Constitution of 1945, Art. I, § 1, (emph. added)

The seminal principle of Missouri governance is the understanding that government exists to serve the people and not the other way around. Likewise, we establish a constitution to restrain greedy men who would subvert the social compact for personal gain. The greatest responsibility of this Court is to keep the application of the Constitution true to its purpose.<sup>2</sup>

It is generally accepted that the power to use eminent domain for public necessities is implicit in the social compact, but it is problematic when the powers inherent in the

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<sup>2</sup> "Solely for the good of the whole" in Art. I, § 1 precludes special treatment by the state of groups or individuals.

state are construed in a way that is destructive of the inalienable liberties those powers were designed to protect.

**3) The Principle Office of Government – including this Court – is to protect the personal and individual rights of the state's citizens. Those rights include property rights.**

Missouri government's *foremost responsibility* is to protect the life, liberty and property of *individuals*, not some sort of concept of a “collective”. This is made clear by the declaration that the state was formed by a “mutual consent” of “we the people” in 1821 and especially the enumeration of the “principles on which our government is founded”, that is, “giv[ing] security” to personal liberties, including “*the enjoyment of the gains of their own industries*”.

“In order to assert our rights, acknowledge our duties, and proclaim the *principles on which our government is founded*, we declare:” ... “That all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty, the pursuit of happiness and the *enjoyment of the gains of their own industry*; that all persons are created equal and are entitled to equal rights and opportunity under the law; that to give security to these things is the principal office of government, and that when government does not confer this security, it fails in its chief design. Missouri Constitution of 1945, Art. I, § 2, (emph. added)

**If government is torn in its responsibility between the principles of individual liberty or providing a nicety for society, the Missouri Constitution sides with individual liberty.** During the 1874 Constitutional Convention, Mr. Gantt reported from the committee dealing with the Preamble and Bill of Rights. He explained Art. II, § 4 (which became the current Art. I, § 2) in this way:

“It is then declared that the main office of government is the security of life, liberty and property - the protection of those things - not protection in the sense in which capital is employed in thousands of industries in order to render bloated one or two in some favored locality - not protection in that sense, but equal protection to all, so that every man may sit secure under the shadow of his own vine and fig tree, and have none to make him afraid.” *Debates of the Missouri Constitutional Convention, 1875 – Volume I, P. 430 at 24* (emph. added) <sup>3</sup>

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3 Like the “good of the whole” clause of section 1, the “general welfare” clause of section 2 precludes special treatment under the law. When one application of the law results in **favored treatment for some at the expense of others**, and the alternative application “confer[s] security” of the individual liberty of certain “persons”, this court must assume the latter alternative is the proper one, since it is in keeping with “the principle office of government”. This is true whether it is a matter of protecting an individual's right to sit in the front of a public bus or protecting his right to own a home or business.

## ARGUMENTS

### II

**1) Protecting the rights of Missourians, including protection from the taking of a person's property for private use, is inherent in the purpose of Missouri government. No proper construction of a constitutional clause can be violative of that purpose.**

Beginning with the universal understanding and expectation of every American, and the express declaration of the founding documents of Missouri, all “persons” in the state have a right to the ownership, use and enjoyment of their property of every sort and the right to equal protection of that property by the law. (1) This is the very reason for the existence of the government of the state – to keep one man's property from being taken by another. (2) The Common Law understanding also includes the prospect that occasionally those individual liberties must yield, to some extent, for the sake of the security of the liberty of other individuals and so the taking of private property for true *public use* is accepted. These two truths, implicit in the social compact, are the starting point of any proper understanding of property rights.

While the purpose of Missouri government was fresh on the Founders' minds, they felt no need to further enumerate those basic truths, but did place a restraint on the implicit power of eminent domain in the 1820 constitution – namely, the requirement for “just compensation”.

“That courts of justice ought to be open to every person, and certain

remedy afforded for every injury to person, property, or character; and that right and justice ought to be administered without sale, denial, or delay; and **that no private property ought to be taken or applied to public use without just compensation.**” Missouri Constitution of 1820, Declaration of Rights, Article XIII, § 7, (emph. added) <sup>4</sup>

**2) The Art. I, § 28 explicit prohibition of takings for private use is a higher standard than the implicit requirement that takings be for “public use”.**

Such explicit statement has been part of the Missouri Constitution since 1875. From the adoption of the constitution of 1820 until the ratification of the 1875 constitution, any requirement that takings be for public use or prohibition of takings for private use were implicit. Up to that point, the only takings clause was very similar to the present Article I, § 26.

Abuses surrounding the many conflicts between Missourians sympathetic to either the North or the South in the 1860s and 1870s resulted in a desire by the framers of the 1875 constitution to clarify and codify the prohibition against taking private property for private use. The convention adopted, and later the people adopted, Art. II, § 20 and its explicit prohibition of takings for private use.

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<sup>4</sup> It could be argued that the just compensation clause is not, in itself, a requirement that takings be for public use. As indicated earlier, such requirement was, and is, *implicit* in the social compact. The just compensation clause might more properly be considered *evidence* that the taking must be for public use.

“That no private property can be taken for private use, with or without compensation, unless by the consent of the owner, except for private ways of necessity, and except for drains and ditches across the lands of others for agricultural purposes in such manner as may be prescribed by law; and that whenever an attempt is made to take private property for a use alleged to be public, it shall be a judicial question, and as such judicially determined, without regard to any legislative assertion that the use is public.” Missouri Const. of 1875, Art. II, § 20<sup>5</sup>

“That private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested. The fee of land taken for railroad tracks without consent of the owner thereof, shall remain in such owner subject to the use for which it is taken.”

Missouri Const. of 1875, Art. II, § 21, (emph. added)

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5 In the 1875 constitution, the prohibition of taking for private use (§ 20) preceded the requirement for just compensation (§ 21) when taking for public use making clear that a prohibition of private takings is the starting point for an evaluation of the proper use of eminent domain.

During the Constitutional Convention of 1874, statements made in oral debate make it abundantly clear that there had been a problem with the taking of private property for private use. Delegate Black mentioned “great outrages”, which included property “taken for purposes which many times was really not public”.

“Now it seems as I said the other day that sometimes there have been great outrages committed but we have already adopted a section which completely overturns the law I take it, as heretofore understood-when the Legislature has declared heretofore that it was necessary for the public benefit and that the property was taken for the public benefit we have generally conceded that it was, and that was the end of it, and then proceeded to the condemnation. Now as we have adopted the 22d section the question as to whether it is for public use or not is left open-to be adjudicated and determined. Now that has been the difficulty heretofore; property has been taken for purposes which many times was really not public.” *Debates of the Missouri Constitutional Convention, 1875 – Volume IV, P. 193 at 34, (emph. added) (NOTE: § 22d was renumbered § 20 and eventually became the current Art. I, § 28)*

In a report from the committee dealing with the Preamble and Bill of Rights and about arbitrary seizures, Mr. Gantt referenced the concern over abuses during and after the Civil War.

“But, in our own country, and I intend to be very brief, sir, and *I do not intend to open a sore* - in our own country and *within a comparatively recent period* we have known quite enough of the evils of arbitrary arrests, and *arbitrary seizures* and searches, to perceive the wisdom, the necessity of erecting as many barriers against that abuse as it is possible for us to do.” *Debates of the Missouri Constitutional Convention, 1875* – Volume I, P. 434 at 11, (emph. added)

Later, in the same report, Mr. Gantt pointed out the need for specific protections against the suspension of the writ of habeas corpus – a need precipitated by events during the Civil War and Reconstruction times.

“I do not believe fifteen years ago it entered into the minds of any gentleman who was at that time old enough to have formed an opinion on the subject & to have reflected upon it, that it was possible that in these United States the privilege of the writ of *habeas corpus* could ever be suspended except in the actual presence of the armed hand in the front that law martial which supersedes the civil law of necessity; and yet, sir, *within those fifteen years we have seen violations of the privilege of personal liberty* which have made the citizens of European governments, & especially of the British government, stand half

incredulously half wonderingly.” *Debates of the Missouri Constitutional Convention, 1875 – Volume I, P. 444 at 26, (emph. added)*

It is abundantly clear that the framers and people of Missouri wanted stronger codified protections of their most basic liberties. ***The prohibition of takings for private use was not a mere reiteration of a requirement that the use be public – it was, and is, a higher standard which is intended to narrow the application of eminent domain.***

**3) The Art. I, § 28 prohibition of taking private property for private use precludes the use of eminent domain when it will result in private ownership – unless there is a constitutional exception to that prohibition.**

While one might construe the “public use” clause of the constitutions of 1820 and 1865 to allow a taking if it results in “public benefit” or for a “public purpose”, the new Art. II, § 20 of the 1875 constitution (the current Art. I, § 28) prohibited takings for private use whether there is a public benefit to the taking or not. In other words, prohibiting takings for private use is not the the exact equivalent of requiring that the taking result in public benefit.

The Kelo type rationale that a taking resulting in a public benefit constitutes a “public use” does not mitigate the prohibition against taking for “private use” in Missouri. The plain reading and application of “private property shall not be taken for private use” means that a taking resulting in a private use is prohibited by Art. I, § 28.

*whether there is a public benefit or not* – unless an exception is provided by another constitutional clause. To construe the Art. I, § 28 “private use” clause otherwise renders the clause superfluous.

“That private property shall not be taken for private use with or without compensation, unless by consent of the owner, except for private ways of necessity, and except for drains and ditches across the lands of others for agricultural and sanitary purposes, in the manner prescribed by law; and that when an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be judicially determined without regard to any legislative declaration that the use is public.” Missouri Const. of 1945, Art. I, § 28, (emph. added)

The drafters understood the need for such exception clauses and provided one in the second clause of Art. I, § 28 - “*except for private ways of necessity, and except for drains and ditches across the lands of others for agricultural and sanitary purposes, in the manner prescribed by law*”.

While it might be possible for “private ways of necessity” to always be a pure private use, with no public use component, “drains and ditches” to drain swamps and other “sanitary purposes” certainly result in a public benefit in addition to their private use. If the mere existence of a *public benefit* was sufficient permit to use eminent domain under the 1875 constitution, there would be no need to spell out this exception. The

framers foresaw the need for such uses of eminent domain so they made them exceptions to the prohibition of taking for private use.

The delegate who offered the amendment, Mr. Lackland, explained his amendment, thus:

“That there are thousands of acres of land in the bottom of the Missouri and Mississippi rivers and other parts of the State that are swamp lands and that are totally unfit for agricultural purposes and are injurious to health, and that these lands can be of no use unless drained and they cannot be drained unless ditches and drains are made across the lands of others.” *Debates of the Missouri Constitutional Convention, 1875* – Volume IV, P.189 at 31, (emph. added)

In addition to the exceptions listed in section 28, Art. I, § 27 of the 1945 constitution allows for the sale to private parties property previously taken for a public use. Like the exception clause in section 28, this section would be superfluous if the private use prohibition was synonymous with a requirement that takings be for “public benefit”.

“That in such manner and under such limitations as may be provided by law, the state, or any county or city may acquire by eminent domain such property, or rights in property, in excess of that actually to be occupied by the public improvement or used in connection therewith, as may be reasonably necessary to effectuate the purposes intended, and

may be vested with the fee simple title thereto, or the control of the use thereof, and may sell such excess property with such restrictions as shall be appropriate to preserve the improvements made.” Missouri Const. of 1945, Art. I, § 27, (emph. added)

**In summary**, if the existence of “public benefit” somehow rendered a “private use” no longer a “private use”, practically no component of commerce could be considered “private use”. Driving a car benefits the public by promoting jobs for those who maintain the car and sell the fuel it burns, as well as the taxes on the fuel. It would be ridiculous for one man to take another's car and claim the taking was not “private use” just because there was a public benefit from the increased miles he drove it, miles which accrued more repairs and taxes. A proper reading of Art I, § 28 results in a prohibition of takings for private use even if there is a public benefit -- unless that private use is one of the uses excepted in section 28 (e.g. “drains and ditches across the lands of others”) or a private use stipulated in another section, such as Art. VI, § 21. Only those constitutionally excepted private uses are to be allowed.

**4) Article VI, § 21 also provides an exception to the Art. I, § 28 prohibition against private taking and must be strictly construed.** <sup>6</sup>

This Court held that the Constitution allows the use of eminent domain where the property will be transferred to private parties only in the case of blighted, substandard, or insanitary areas as stipulated by section 21. (*Annbar Associates v. West Side Redevelopment Corp.*, 397 S.W.2d 635, 646 (Mo. 1965)). Otherwise, the power of eminent domain may not be used to transfer property to private use, as is stipulated by Art. I, § 28.

**5) The Article VI § 21 exception to the Art. I, § 28 prohibition against private taking does not apply to non-charter cities, like Arnold.**

When there arose a desire to use eminent domain to remedy blighted areas in public/private partnerships, the framers of the 1945 constitution recognized that they needed an additional exception to the prohibition of private takings, so they included Art. VI, § 21.

“Laws may be enacted, and any city or county operating under a constitutional charter may enact ordinances, providing for the clearance, replanning, reconstruction, redevelopment and rehabilitation of

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<sup>6</sup> Appellant seeks to obfuscate the issue by leading the Court to believe that Respondent claims Art. VI, § 21 is the source of his protection, but the most explicit source is actually Art. I, § 28 in addition to the general guarantees of Art. I, § 2. Respondent's actual claim is that Art. VI, § 21 could only *diminish* his position if Arnold were a chartered city.

blighted, substandard or insanitary areas, and for recreational and other facilities incidental or appurtenant thereto, and for taking or permitting the taking, by eminent domain, of property for such purposes, and when so taken the fee simple title to the property shall vest in the owner, who may sell or otherwise dispose of the property subject to such restrictions as may be deemed in the public interest.” Missouri Constitution of 1945 Art. VI, § 21 (emph. added)

They intended this new exception to have limited application – that is, to “any city or county operating under a constitutional charter”. If Article VI, §21 were intended to be a general exception to the private use prohibition of Art I, § 28, it would have been added to the “except” clause of § 28, and not among sections that deal exclusively with chartered cities and counties.

Since most of the powers from Art. VI, § 21 were already existent in Missouri municipalities, or assignable by the General Assembly, there could only be two reasons to add Art. VI, § 21 to the constitution: (1) To confer immutable constitutional powers to constitutionally chartered cities and counties – powers that would be independent of the General Assembly, and (2) to allow for a use of eminent domain that would otherwise be prohibited – that is, another exception to the private taking prohibition of Art I, § 28.

Clearing blighted and insanitary areas had long been considered a “public use”, but doing so in a manner that includes “private use” along with the public use creates tension with the Art I, § 28.<sup>7</sup> If the prohibition of private takings is merely equivalent to a requirement that takings be for public benefit, Art. VI, § 21 would be superfluous, since such public benefit takings were already allowed. However, the Art. I, § 28 prohibition of private takings applies even when there is a public benefit, so Art. VI, § 21 has meaning and it DOES NOT “merely confirms the General Assembly’s power to enact laws”, as the appellant would have the Court believe. Appellant's Brief, at 11, 9

**6) *Dalton v. Land Clearance for Redevelopment Authority* supports the contention that Art. VI, § 21 constitutes an exception to Art. I, § 28 only for chartered cities.**

In *State Ex Inf. Dalton v. Land Clearance Authority*, 270 S.W.2d 44 (Mo. 1954), the relator argued “that Article VI, § 21, should not be read as an exception to Article I, § 28”. The court disagreed in the strongest terms, saying “Article VI, § 21, in express terms, unqualifiedly... provides for the taking... by eminent domain.” (emph. added) The decision went on to say,

“A vexing question is whether Article VI, § 21, **constitutes an exception** to Article I, § 28, which declares that the question whether

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<sup>7</sup> Chapter 99, RSMo - "The Housing Authorities Law" - originated in 1939 to mitigate “insanitary or unsafe dwelling accommodations”. Although eminent domain was a component of that law, its use was by the government housing authority for property that was to be owned and managed by that authority.

the contemplated use of property sought to be taken by the processes of eminent domain shall be judicially determined without regard to any legislative declaration that the use is public. **On the other hand**, Article VI, § 21, in express terms, unqualifiedly authorizes the legislature and cities and counties **operating under constitutional charters** to enact legislation providing for the taking of blighted and insanitary areas by eminent domain.” *State Ex Inf. Dalton v. Land Clearance Authority*, 270 S.W.2d 44 (Mo. 1954) Point I [2] (emph. added)

The Court's decision in favor of the respondent relied heavily on the existence of Article VI, § 21, admitting that with the new constitution of 1945 “for the first time appeared the broad powers granted the legislative branch as set forth in Article VI, § 21”. *State Ex Inf. Dalton v. Land Clearance Authority*, 270 S.W.2d 44 (Mo. 1954) In effect, the court said that Article VI, § 21 WAS an exception to Article I, § 28.

It should be noted that in *Dalton*, the court also relied on the theory that the purpose of laws developed pursuant to Art VI, § 21 was to deal with blighted areas and such purpose is a public purpose. The sale of properties taken for such purpose, the court claimed, was an incidental to that purpose – not the purpose itself. **The court did not raise the question as to the scope of the “broad powers granted the legislative branch”, that is, whether they may extend to non-charter cities, because it would have been moot in light of the charter status of Kansas City. That question is a novel**

**one, and is at the core of the case before the Court at this time.**

For the City of Arnold to use the power of eminent domain against the defendant in the instant case, they must either have direct constitutional powers to enact ordinances conferred by Art VI, § 21 or powers properly assigned by the General Assembly. The city has neither.

The class of cities with powers to “enact ordinances” pursuant to this sort of private use eminent domain are stipulated in Art VI, § 21, that is, “any city or county operating under constitutional charter”. As a 3<sup>rd</sup> Class, non-chartered city, Arnold lacks those powers.

The remaining question is whether the General Assembly has constitutional authority to grant such powers to Arnold.

**7) The General Assembly does not have the authority to extend the Article VI, § 21 exception beyond that intended by the framers and the people who adopted the constitution of 1945, and such intent only included constitutionally chartered cities and counties.**

As has been established, the people of Missouri “*mutually agree[d]* to form and establish a free and independent republic” (Opening clause of the 1820 Constitution), the “*principle office*” of which is to “*secure*” the “*right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry*”. Missouri Const. of 1945, Art. I, § 2 Every possible interpretation of any constitutional clause must be construed in light of this core principle and weight must accrue to alternatives favoring it.

The private taking prohibition of Art. I, § 28 epitomizes this core principle. For a city to use eminent domain pursuant to the TIF Act in the manner of the City of Arnold in the instant case, they must appeal to a specific explicit constitutional exception to Art. I, § 28 – they must appeal to Art. VI, § 21. An obstacle to such an appeal exists in the fact that the entirety of Art. VI, § 21 only applies to constitutionally chartered cities.

Constitutionally chartered cities can act with either statutory grants of power by the general assembly or through their own constitutionally bestowed powers while non-charter cities, such as the City of Arnold, cannot act without specific statutory grants of power. *Cape Motor Lodge v. City of Cape Girardeau*, 706 S.W.2d 208 (1986)

It is indisputable that Arnold can not “*enact ordinances, providing for the clearance, replanning, reconstruction, redevelopment and rehabilitation of blighted, substandard or insanitary areas*” Missouri Const. of 1945 Art. VI, § 21, without some other bestowal of power. The only remaining question is if the clause “*Laws my be enacted*” empowers the General Assembly to convey similar power to non-charter cities.

The starting point for answering that question should be a contextual study. Section 21 is in the midst of a series of sections that deal exclusively with chartered cities and counties. Sections 18a, 18b, 18c, 18d, 18e, 18f, 18g, 18h, 18i,18j,18k, 18l, 18m, 18n, 18o, 18p, 18q, 18r, 19, 19a, 20, 21, & 22 all deal exclusively with constitutionally chartered cities and counties. Since every other aspect of these sections applies to constitutionally chartered cities and counties, the only reasonable application of “*Laws may be enacted*” is also to limit it to constitutionally chartered cities and counties.

“The organization of the constitution creates a presumption that matters

pertaining to separate subjects therein described should be set forth in the article applicable to that subject and not commingled under unrelated headings. **The organizational headings of the constitution are strong evidence of what those who drafted and adopted the constitution meant by 'one subject.'**" *Missourians to Protect Init.*

*Proc. v. Blunt*, 799 S.W..2d 824 (Mo.1990), (emph. added)

Section 18(e) uses very similar language that clearly applies only to such counties.

“Laws shall be enacted providing for free and open elections in such counties, and laws may be enacted providing the number and salaries of the judicial officers therein as provided by this constitution and by law, but no law shall provide for any other office or employee of the county or fix the salary of any of its officers or employees.” Missouri Const. of 1945 Art. VI, § 18e

Admittedly, § 18e is more plain than § 21, but it is contextual evidence that the subject of § § 18a to 22 is *constitutionally chartered cities and counties* and any power those sections grant to the General Assembly to create laws must only apply to *constitutionally chartered cities and counties*.

Transcripts of the debates from the 1943-1944 constitutional convention make clear the intention of the drafters was to apply Art. VI, § 21 only to chartered cities and counties. Proposal 336, the proposal that eventually became Art. VI, § 21, originated with Kansas City City Hall. *Constitutional Convention of 1943-44, Verbatim Stenotype*

*Debates* at 2090, 35. Two committees on local government were set up. The first was called the “*Committee on Local Government*” - it was assigned a set of propositions called “File 11”. The second committee was called the “*Committee on Local Government (City of St. Louis, St. Louis County and Jackson County)*”- it was responsible for File 12. *Constitutional Convention of 1943-44, Verbatim Stenotype Debates*, at 2171, 2175-76. Proposal 336 became Art. VI, sec, 21 and was part of File 12. File 12 also dealt with all the proposals relating to the process of chartering cities and counties.

About Proposal 336, delegate Stevens said it “deals with the condemnation of property for the purpose of disposing of these blighted areas in large cities.” *Constitutional Convention of 1943-44, Verbatim Stenotype Debates*, at 2121, 15 (emph. added) During a debate about fees, delegate Allen explained that an amendment that applied to smaller counties was out of order while they worked on File 12. He said, “Now, we’re on the file in which by the mandate of this Convention is only supposed to apply to Jackson County, St. Louis County and the City of St. Louis and the amendment if attempted here would properly have been in the other file and is not proper for this file.” *Constitutional Convention of 1943-44, Verbatim Stenotype Debates* at 2176, 11 (emph. added) The amendment pertaining to smaller counties was voted down. *Constitutional Convention of 1943-44, Verbatim Stenotype Debates* at 2178, 21

**8) Even if one is inclined to reject all the foregoing, the use of the defendant's property is not truly a “public use” and such use has failed the requirement that there be a judicial determination whether it be public.**

Even the most liberal construction of “public use” requires that there be a “public benefit”. Since the question is not merely about what happens to one parcel of land, (eminent domain is a state power, after all) it is not enough to determine if the taking of that one parcel, or even an area around that parcel, results in a public benefit. The question that must be answered is, “Does the law providing for taking this property result in a benefit to the state of Missouri?” In other words, **“Is there a net public benefit?”**

Clearly, the answer is often “no”. **In Missouri, 62 years of evidence (since the 1945 adoption of Art. VI, § 21) indicates the objective of clearing blight has failed when the overall picture is considered. “Blight” continues to exist in great abundance in the largest cities and great damage has been done to the undergirding of liberty.**

**9) It is the responsibility of the court to determine whether a use be public and the court must examine the larger implications of a taking in doing so.** Note: *State ex rel Broadway-Washington Assoc. Ltd. v. Manners*, 186 S.W.3d 272, 274 n.2 (Mo. 2006) (“Article I, section 28 of the Missouri Constitution provides that ‘... when an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be judicially determined without regard to any legislative declaration that such use is public.’ It is an open question as to whether the procedures in the act comply with this constitutional mandate.”)

The responsibility of the Court is underscored by an explanation by delegate Gantt of the proposal that became Art. I § 28 at the 1874 constitutional convention:

“If it is for a private use the consent of the owner is the indispensable condition to its being taken, and that it shall not be competent for the General Assembly if some one covets the vineyard of his neighbor to declare that that vineyard may be taken and used as the vineyard of the trespasser and 'that it is hereby devoted to public use,' but that in every such case the question whether the use declared be really a public one, shall be a judicial question to be determined by a court of competent jurisdiction. If the court be of the opinion-if the court shall declare as a matter of law that it is not a public use, but that it is a private use, then, as many declarations as there are lines in a legislative enactment will not mend the matter, and the legislative assertion that black is white and that 2 and 2 make 5, will be unavailing.” *Debates of the Missouri Constitutional Convention, 1875 – Volume I, P. 440 at 26, (emph. added)*

A report published in the January issue of the St. Louis Federal Reserve Board's *The Regional Economist*, analyzed the use of eminent domain – it looked at “the big picture” - a society wide evaluation. *Thomas A. Garrett and Paul Rothstein*, “The Taking of Prosperity? Kelo vs. New London and the Economics of Eminent Domain”, <http://stlouisfed.org/publications/re/2007/a/pdf/prosperity.pdf> (Last visited November 28, 2007)

The following quotes from that analysis militate against any conclusion that eminent domain in the instant case is a true “public use” when assessed on a societal level.

- “Specifically, any economic analysis of eminent domain as it relates to the Kelo decision must recognize the tradeoffs inherent in giving local governments this kind of power over local economic development. Those who approve of eminent domain as it was used in Kelo fail to recognize the difference between what economists call “private goods” and “public goods.” They also fail to see the inefficiencies often generated from government intervention in private markets.” *Id.* p. 8 (emph. added)
- “However, the taking of private property from one person and giving it to another for economic development, even if one considers the holdout problem and payment of just compensation, is unlikely to create a net benefit to society. It is more likely to create economic inefficiencies and to reduce economic growth.” *Id.* p. 8 (emph. added)
- “Historical anecdotal information and formal academic research show that, in general, countries with less government involvement in private markets experience greater levels of economic growth.” *Id.* p. 8 (emph. added)
- “Of course, there will be certain groups that do benefit from the taking of private property, such as developers, property managers and local politicians. Developers and property managers will gain income from developing the property. Many local politicians favor targeted economic development because of what they see as

the immediate benefits from development, such as increased employment and tax revenue. These economic benefits also translate into political benefits for those politicians who pledge to improve local economic development. Not realized, however, is that the supposed immediate and tangible benefits from taking private property for economic development are outweighed by the greater economic costs of government intervention in private markets.” *Id.* p. 8 (emph. added)

- “All of these economic development tools, however, are unlikely to lead to an overall increase in societal welfare because each tool simply involves a transfer of income from one group to another, often resulting in a zero-sum gain.” *Id.* p. 8 (emph. added)
- “Research has shown that without property rights, individuals will no longer face the incentive to make the best economic use of their property, be it a business or home, and economic growth will be limited.” *Id.* p. 9 (emph. added)

**Blight designations with the looming specter of eminent domain create a whole set of problems more onerous than those they seek to solve. In addition to the economic related problems identified in the “The Taking of Prosperity?”, grave social problems result and good governance suffers.** Too often, that portion of society least able to defend their rights suffers the most.

**Some of the negative effects to society include:**

- a) Constitutional principles, like individual freedom have slipped in the face of nebulous benefits to society.
- b) The current system invites and facilitates corrupt action on the part of public

officials.

- c) The current system dissuades local government from maintaining infrastructure, so that local government often neglects its responsibility and creates the “blight” it then cites to the detriment of the property owners.
- d) The current system gives incentive and means for powerful private interests to misuse the system.
- e) The current system confounds the powers of government, using eminent domain powers where true police powers should be applied. The result is harm done to the very people who should be protected from problem properties - the neighbors of such properties.

## CONCLUSION

### IV

The decision of the Circuit Court of Jefferson County, Missouri in favor of defendants Homer and Julie Tourkakis was correct because the Missouri Constitution, in Article I § 28, expressly prohibits the taking of their property for the private use of THF Realty. Article VI §21 creates a very limited exception to that prohibition which allows constitutional charter cities to rehabilitate blighted areas of the sort that had developed throughout the end of the 19<sup>th</sup> and beginning of the 20<sup>th</sup> centuries – blighted areas that do not exist in cities such as Arnold, Missouri. Furthermore, a judicial determination whether the use be public, as required by Article I, § 28, has not been made and such a determination would be negative if either principles of individual liberty or the broadest societal benefits are considered.

DATED: December \_\_\_\_, 2007

Respectfully submitted,

By, \_\_\_\_\_

Ronald J. Calzone, acting Pro Se

## CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Rule 84.06(c), this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06(b); and (3) contains 6959 words, exclusive of the sections exempted by Rule 84.06(b), determined using the word count program in Word Perfect.

I also further certify that the accompanying diskette filed with the Court has been scanned and was found to be virus free pursuant to Rule 84.06(g).

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Ronald J. Calzone, acting Pro Se

33867 Highway E  
Dixon, MO 65459  
(573) 759-7556  
(573) 759-2147  
ron.c@ewranch.com

## CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies of the foregoing document on paper and one (1) copy on diskette were served by first-class U.S. mail, postage prepaid this \_\_\_\_\_ day of December 2007, to:

Michael A. Wolff  
7911 Forsyth Blvd., Suite 300  
Clayton, MO 63105-3860

Tracy Gilroy  
231 S. Bemiston Ave., Suite 800  
St. Louis, MO 63105

James S. Burling  
Timothy Sandefur  
Pacific Legal Foundation  
3900 Lennane Dr., Suite 200  
Sacramento, CA 95834

Gerald T. Carmody  
Kelley F. Farrell  
Kameron W. Murphy  
Carmody MacDonald P.C.  
120 South Central Avenue, Suite 1800  
St. Louis, MO 63105

Robert K. Sweeney  
P.O. Box 20  
503 Main Street  
Hillsboro, MO 63050

Michael F. Barnes  
AmerenUE  
1901 Chouteau Avenue  
M/C 1310  
St. Louis, MO 63103

William C. Dodson  
P.O. Box 966  
Imperial, MO 63052

David P. Abernathy  
Laclede Gas Company  
720 Olive Street, Room 1402  
St. Louis, MO 63101

(cont. next page)

John F. Medler, Jr.  
Southwestern Bell Telephone L.P.  
One AT&T Center, Room 3558  
St. Louis, MO 63101

Marc B. Fried  
Dennis J. Kehm, Jr.  
Office of the County Counselor  
County of Jefferson, Missouri  
P.O. Box 100  
Hillsboro, MO 63050

Kenneth C. Jones  
Missouri American Water Co.  
727 Craig Road  
St. Louis, MO 63141

Jovita M. Foster  
Armstrong Teasdale LLP  
One Metropolitan Square, Suite 2600  
St. Louis, MO 63102-2740

Robert D. Vieth, Trustee  
7805 Cassia Court  
St. Louis, MO 63123

---

Ronald J. Calzone, acting Pro Se

33867 Highway E  
Dixon, MO 65459  
(573) 759-7556  
(573) 759-2147  
[ron.c@ewranch.com](mailto:ron.c@ewranch.com)